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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Revision of Part 22 and Part 90
of the Commission's Rules to
Facilitate Future Development of
Paging Systems

WT Docket No. 96-18

Implementation of Section 309(j)
of the Communications Act --
Competitive Bidding

PP Docket No. 93-253

To: The Commission

**METROCALL MOTION FOR STAY PENDING
RECONSIDERATION AND CLARIFICATION**

Metrocall, Inc. ("Metrocall"), by its attorneys and pursuant to Section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 405 (a), and Section 1.429 (k) of the Commission's Rules, 47 C.F.R. § 1.429 (k), hereby submits this Motion for Stay pending review of its concurrently filed "Petition for Partial Reconsideration and Clarification" ("Petition") of the Commission's "Second Report and Order" ("Second Report") in the above-captioned rulemaking proceeding.¹ In particular, Metrocall submits that good cause exists to stay that portion of the Second Report that would lead to the dismissal of all pending mutually exclusive paging applications, and all pending exclusive-use paging applications filed after July 31, 1996. See Second Report at ¶ 6. In addition, Metrocall's Petition presents evidence of glaring problems with the FCC's auction proposal, that should be addressed and cured prior to the scheduling of any paging auctions. In support of this Motion, the following is respectfully shown:

¹ The Second Report was published in the Federal Register on March 12, 1997; thus, this Motion and concurrently filed Petition are timely. See 62 Fed. Reg. 11616.

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I. Statement of Interest

Metrocall is one of the largest publicly traded paging companies in the nation (NASDAQ trading symbol: "MCLL"). Through its licensee-subsiary, Metrocall USA, Inc., Metrocall provides Commercial Mobile Radio Service ("CMRS") paging services throughout most of the United States. Through its corporate predecessors, Metrocall has provided paging services for more than a decade, and it continues to undergo tremendous growth. Metrocall previously filed Comments in this FCC rulemaking proceeding, and is thus a party in interest.

Metrocall has spent considerable time, money and resources in preparing paging applications necessary to improve its paging networks and meet the demands of its two million paging customers. Some of those applications have been pending for more than two years. The FCC's Second Report would dismiss those applications, even though they have complied with the FCC's application, protest, and cut-off rules and procedures. That action, if not enjoined, will harm Metrocall's paging business by indefinitely delaying its network expansions and upgrades, and by potentially depriving Metrocall the opportunity to obtain grants at the specific locations where it needs additional paging transmitters. Moreover, as explained in its Petition, there are other aspects of the FCC's paging auction plan that could materially harm Metrocall and similarly situation paging companies.

For these reasons, as a paging company whose business will be adversely affected if the Commission's dismissal of pending paging applications is not enjoined, Metrocall has standing as a party in interest to submit this Motion for Stay.

II. Good Cause Exists for Grant of a Stay

The Commission may grant a stay pending review of a petition for reconsideration

following a showing of "good cause." See 47 C.F.R. §1.429(k). That standard is more flexible than the judicial standard for obtaining injunctive relief. For instance, the FCC may grant a stay pending reconsideration even where an applicant has *not* shown any likelihood of success on the merits. See, e.g., Angeles Broadcasting Network, 59 RR2d 758 (1985) (stay granted to avoid interruption of service to the public despite petition's lack of merits). In other cases, the Commission has granted a stay though there was no showing of "irreparable injury", which is typically a necessary element to obtain a judicial injunction. See Lompoc Valley Cable TV, 1 RR2d 1081 (1964) (stay granted due to "policy questions" raised by the petitioner).

In short, the FCC does not need to apply any rigid "test" or formula to grant a stay pending review of a petition for reconsideration. Each stay request should be reviewed on the merits, with a stay granted when there is a sufficient showing of good cause. Metrocall's petition for reconsideration raises serious public interest concerns that warrant a stay under these Commission standards.

First of all, the Commission did not previously notify the public that it intended to dismiss all pending mutually exclusive applications and all applications filed after July 31, 1996. Indeed, repeated public pronouncements and notices concerning efforts to make the 931 MHz "algorithm" function properly, surely left the contrary impression. The public should have assumed that the FCC would process all pending applications under existing rules pursuant to that "algorithm," and that mutually exclusive ("MX") applications might be subject to auctions (rather than lotteries), but that they would not be arbitrarily dismissed.

Instead, a policy decision to dismiss all these applications was presented to the public for the first time in the Second Report. Hence, this issue will be subject to comment by adversely

affected parties only now, during the statutory reconsideration period. Fundamental fairness and informed decision-making dictate that this agency should not precipitously dismiss those applications until the adversely affected parties have had an opportunity to comment on this agency proposal, and to highlight problems with that plan.

Moreover, the Second Report is essentially silent as to why the FCC considers the dismissal of those applications to be necessary, in the public interest, or to serve some legitimate policy objective. The Second Report says only that dismissal of these applications is [d]ue to the transition to geographic licensing "...", but does not explain why the processing of pending applications would in any way undermine geographic licensing. Indeed, since the Second Report allows paging licensees the option of exchanging site-by-site licenses for a single "system-wide" licenses (Second Report at ¶ 58), it is difficult to discern any inconsistencies between the continued processing of pending site-specific applications and a transition to geographic area licensing for paging stations.

At a minimum, adversely affected parties are entitled to know the Commission's reasons for the dismissal of their applications, and to offer countervailing reasons why that action would be contrary to the public interest. For example, although the FCC has promoted auctions as a means of expediting the licensing of paging spectrum, the dismissal of pending applications undermines that policy goal; this dismissal will undoubtedly delay the initiation of paging service in many market areas.

In the case of post-July 31 applications that are not subject to "MX" filings, those applications could be immediately granted under the FCC's existing rules; that action would immediately benefit paging subscribers who cannot receive service in those areas. Even with

respect to pending applications that are "MX'd", licenses would be granted far more quickly if an auction were scheduled only for those applicants that are already "MX'd" in particular markets, rather than dismissing those applications and forcing them to wait for an auction "window" sometime in the future. Since the FCC has determined that the future auction will be for multiple licensees, with simultaneous bidding, that process will take far longer than would be the case if auctions were held immediately for existing "MX" situations in a relatively limited number of markets.

The FCC has promoted auctions as a more administratively easy means of granting licenses. Yet, by dismissing all of these pending applications, many of which are ripe for grant, the FCC will have essentially doubled the amount of administrative work necessary to grant these paging licenses. If there is some reason why it makes administrative sense to duplicate the agency's license processing efforts, the Second Report is certainly silent as to what that may be.

Finally, the dismissal of pending paging applications will certainly cause irreparable injury to the adversely affected parties. The expeditious grant of those applications is necessary to allow legitimate, operating paging companies to expand their paging networks to meet the demands of their subscribers. Since the FCC does not know when paging auctions will be held, paging carriers cannot tell their customers when service will be available in these areas. Consequently, some customers may look to other wireless services for assistance, abandoning paging altogether. Moreover, paging carriers have to order equipment and make financial commitments for additional transmitter sites months in advance; the dismissal of these applications will cause delays and uncertainties to those business plans.

No one can accurately predict the extent of the damage that the FCC's dismissal decision

will cause to paging companies; but, that is the very definition of "irreparable injury". The injury may be great, it may be small; but, it is certain that no subsequent actions by this agency will suffice to make the adversely affected parties "whole" again, or to return these businesses to the *status quo ante* that existed prior to the dismissal of their applications. That is why a stay of this dismissal decision is eminently appropriate. See, e.g., Federal Leasing v. Underwriters at Lloyd's, 650 F.2d 495, 499 (4th Cir. 1981); Blackwelder Furniture Co. v. Selig Manufacturing Co., 550 F.2d 189, 196 (4th Cir. 1977); Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970); Perpetual Building Limited Partnership v. District of Columbia, 618 F.Supp. 603 (D.D.C. 1985).

In short, "good cause" certainly exists, under FCC precedents, for the FCC to stay the dismissal of these paging applications, and to stay the commencement of paging auctions pending review of Metrocall's Petition. No harm will befall third parties or the public interest if a stay is granted, and, it is a "proper means of maintaining the status quo pending final action on the petitions for reconsideration." Arizona Mobile Telephone Company, 66 FCC2d 691 at ¶ 13 (1977). A stay will provide the FCC the opportunity to review the pending petitions for reconsideration, "study the ... pleadings, conduct the proper research", and craft an order that will address the legitimate interests of these pending applicants and their subscribers. Id. at ¶ 13.

III. This Stay Request Meets the Judicial Standards

If for some reason the FCC were to apply the judicial standards for obtaining injunctive relief, this stay request still meets that test and should be granted. The familiar "four-prong" test for injunctive relief in the District of Columbia and other Circuits states that a stay should be granted where: (1) interested parties are likely to prevail on the merits; (2) interested parties will

be irreparably harmed should the stay be denied; (3) no harm will result to other interested parties if the stay is granted; and (4) the public interest warrants that a stay be granted.

Washington Metropolitan Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). This test is a "flexible one", Population Institute v McPherson, 797 F.2d 1062, 1078 (D.C. Cir. 1986); an "absolute certainty of success" is not required. Id. citing Cuomo v. U.S. Nuclear Regulatory Comm., 772 F.2d 972, 974 (D.C. Cir. 1985). Metrocall's request for stay satisfies these judicial standards.

A. Likelihood of Success on the Merits

For reasons stated herein and in Metrocall's accompanying Petition for Reconsideration, there is a high likelihood that Metrocall would prevail on the merits. The dismissal of pending paging applications appears to be inconsistent with the FCC's own procedures and pronouncements concerning the processing of these applications. Moreover, the dismissal of those applications would appear to be contrary to recent judicial precedents that have addressed quite similar issues on appeal of FCC actions. Although the FCC may disagree that there is a high likelihood of success should this matter need to be litigated, it simply makes great practical sense to stay that dismissal order, and at least entertain a discussion of these legal arguments before the applications are dismissed and the damage is essentially done.

B. Metrocall and Others will Suffer Irreparable Harm if the Applications are Dismissed.

Although Metrocall does not oppose some form of geographic-area licensing, it never contemplated that its site-specific applications that have cleared the FCC's cut-off period would be dismissed by the FCC. If that action is enforced, in some parts of the country Metrocall would be forced to bid for MTA-wide licenses, where it may have needed only one or two

additional transmitter sites to service its existing customer base in a given community.

Moreover, since neither the FCC nor Metrocall can predict who would bid against Metrocall for that MTA, it is entirely possible that in some instances, Metrocall will never be able to obtain the right to build that additional transmitter site, despite having filed an application that complied with the FCC's existing licensing rules.

The harm to Metrocall's invaluable customer goodwill, and its competitive posture in various markets throughout the U.S., will be immeasurable. Consequently, injunctive relief in the form of a stay is eminently appropriate.

C. No Harm to Other Interested Parties.

No one will be harmed if the FCC enjoins its dismissal action, and even if it ultimately grants those applications. Potential bidders must have anticipated that these pending applications, including "MX" applications, would be processed under existing rules or in accordance with the transition to auctions/wide-area licensing rules, since the FCC never indicated anything to the contrary. Moreover, with the "freeze" in place, a stay makes no difference to third parties who could not file for these particular transmitter sites in any event. The stay merely maintains the *status quo ante* while the Commission considers the legal and equitable arguments for grant of these pending applications.

D. A Stay Will be in the Public's Interest.

The overriding purpose of a stay is to protect the public interest from injury or destruction while remedies are being pursued. The Evening Star Broadcasting Company et al., 68 FCC 2d 158,163 (1978). Surely those interested customers who will benefit from a rapid grant of these pending applications will be served by a stay. And those paging carriers who

serve the public interest will be spared any injury if this stay is granted. On balance, it simply makes good common sense to stay the dismissal of these pending applications pending review of Metrocall's Petition and any other petitions for reconsideration.

CONCLUSION

WHEREFORE, the foregoing premises considered, Metrocall respectfully submits that a grant of this Motion for Stay will be in the public interest, and that the Commission should stay its decision to dismiss all pending and "MX" paging applications, and stay the initiation of paging auctions, pending full review of Metrocall's and any other petitions for reconsideration.

Respectfully submitted,
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